Zingo Invetsments Limited & another v Bai Lin (K) Ltd & 2 others (Civil Appeal E157 of 2021) [2024] KEHC 11502 (KLR) (Civ) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11502 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E157 OF 2021

JN NJAGI, J

SEPTEMBER 26, 2024

BETWEEN

ZINGO INVETSMENTS LIMITED ..... 1ST APPELLANT

ROBERT NJOKA MUTHARA ..... 2ND APPELLANT

AND

BAI LIN (K) LTD ..... 1ST RESPONDENT

YANTAI GOLDEN STAR LEATHER CO. LTD ..... 2ND RESPONDENT

DONG LIN LU ..... 3RD RESPONDENT

(Being an appeal from the judgment and decree of Hon. L.L. Gicheha, Chief Magistrate, in Nairobi MCC Civil suit No. 10637 of 2018 delivered on 19/3/2021)

JUDGMENT

1. The Respondents herein who were the plaintiffs at the lower court brought suit against the Appellants seeking recovery of USD 22,500 that the respondents had paid to the appellants in a contract for supply of 10 pallets of wet hide skins which contract the appellants breached. The claim was denied by the appellants, then defendants, who contended that they had fully complied with the contract and that it is in fact the respondents who had not fulfilled their part of the contract and owed them USD 23,033 which the appellants counterclaimed. After a full hearing the trial magistrate found that it is the appellants who owed the respondents USD 22,500 and entered judgment for the said sum and dismissed the appellants` counterclaim. The appellants were dissatisfied with the judgment of the learned trial magistrate and instituted the present appeal vide a memorandum of appeal dated 24th March 2023.

2. The grounds of appeal are that:

1. The learned magistrate erred in law and in facts in that she entered judgement in favour of the Plaintiffs for the amount of USD 22,500.00 as claimed and dismissed the Defendants counter-claim for USD 23,033.00 when she knew or ought to have known that the 1st Defendant had fulfilled its part of the contracts and that it is the plaintiffs who did not pay fully for the services rendered and goods delivered on behalf of the Plaintiffs and hence arrived at the wrong conclusion.

2. The learned magistrate erred in law and fact in holding that the Plaintiffs had proved their case on a balance of probabilities and hence entered judgement in their favour and that the Defendants had not proved the counter-claim and hence dismissed the same when she knew or ought to have known that the Plaintiffs' claim was not proved and should have dismissed the same and enter judgment in favour of the Defendants who had discharged their burden and had proved by documentary evidence that the Plaintiffs' owed the 1st Defendant the sum claimed in the counter-claim.

3. The learned trial magistrate erred in law and fact in entering the judgement in favour of the Plaintiffs when she knew or ought to have known the same amounted to unjust enrichment to the Plaintiffs who had already received the services and goods from the 1st Defendant.

4. The learned trial magistrate erred in law and fact in that she failed to make a finding that the Plaintiffs' witness was not credible and that the Plaintiffs' evidence adduced during he hearing and the documents produced by the Plaintiffs contradicted the pleadings already filed, and thus arrived at a wrong conclusion.

5. The learned magistrate erred in law and fact in that she failed to make a finding that the 2nd Defendant was wrongly enjoined in the suit as he was merely an officer of the 1st Defendant and did not execute the contracts on his personal behalf but was acting on behalf of the 1st Defendant which is a legal entity and hence arrived at the wrong conclusion.

6. The learned magistrate erred in law and fact in that she failed to consider all the evidence, documents produced and submissions by the Defendants and thus arrived at the wrong conclusion.

7. The said judgment is contrary to law and is not supported by evidence adduced.

Respondents` Case at the lower court

3. The case on the part of the respondents was that they entered into an agreement with the appellants for the appellants to supply them with 20 pallets of wet blue goat skins at a total cost of USD 90,000. The Respondents made a down payment of USD 45,000 as per the agreement. The supply was to be done within 28 days. However, the Appellants were able to secure only 5 pallets of the consignment worth USD 22,500. The Appellants cited the fact that the prices of the consignment had gone up hence they could not supply the consignment on the agreed contractual price.

4. The 3rd Respondent requested the Appellants for a refund of the remaining USD 25,500 out of the initial deposit of UD 45,000 but the Appellants failed to deliver the refund. The clients for the 3rd Respondent exerted pressure on him to ensure that the full consignment of 20 pallets was delivered on time. The 3rd Respondent using his own means sourced for the remaining 15 pallets from Nairobi Tanneries and delivered them to the appellant to add to the 5 the appellant had delivered. That made a total of 20 pallets. The appellant shipped the 20 pallets for the respondents and delivered shipping documents to the Respondents.

5. With regard to the remaining USD 22,500 out of the deposit of USD 45,000, the 3rd Respondent kept on pressing the Appellants for a refund. The appellants refused to refund and instead approached the Respondents with a proposal to supply them with 10 pallets of wet blue hides skins. The parties entered into a second contract for supply of 10 pallets of wet blue hide skins at a cost of USD 29,000. The terms were that the Appellants were to utilize the remaining deposit of USD 22,500 to procure and make the supply. That the sum of USD 6,500 on top of the sum of USD 22,500 would be paid on delivery of the 10 pallets. However, nothing was forthcoming from the Appellants. The respondents sued to recover the sum of USD 22,500.

Appellants/Defendants` Case at the lower court

6. The Appellants` position on the other hand was that both contracts were entered into on 11th June 2010. That the respondent made a deposit of USD 45,000. That thereafter the 3rd defendant made a variation on the goods to be supplied, the consignee and the port of destination. That in furtherance of the contracts the 1st appellant on diverse dates supplied the respondents with 5 pallets of wet blue goat skins valued at USD 22,500 and 20 pallets of wet blue skins valued at USD 45,533 thereby making a total of USD 68,033. That the respondents only paid USD 45,000 leaving a balance of USD 23,033 unpaid. They counterclaimed the said sum. They denied that they owed the respondents a sum of USD 22,500.

Judgment of the trial court

7. The trial magistrate in her judgment found that the appellants were unable to deliver the 20 wet goat skin pallets as per the contract and only managed to supply 5 pallets worth USD 22,500. That the appellant was left with a balance of USD 22,500. The court found that it is the respondents who purchased the other 15 pallets to make a total of 20 pallets and delivered them to the appellant for export.

8. The court found that the parties entered into another agreement for supply of 10 pallets of wet cow hides at a cost of USD 29,000. That the balance from the 1st agreement of USD 22,000 was placed as deposit leaving a balance of USD 6,500 to be paid by the respondent on delivery of the goods. That there was no evidence that the appellant supplied the consignment of USD 29,000 nor that it refunded USD 22,500. The court held that the appellant did not prove its counterclaim.

9. The appeal was disposed of by way of written submissions of counsels appearing for the parties.

Appellants' Submissions

10. The Appellants submitted that the Respondents had not discharged their burden of proof for the trial court to enter judgment in their favour.

11. The Appellants decry the fact that the Respondents had intimated that the second agreement was a forgery, yet they neither adduced any evidence of forgery or fraud nor had they pleaded fraud in their plaint. The Appellants relied on the cases of Vijay Morjaria v Nanshingh Madhusingh Darbar & Another (2000) eKLR and Eviline Karigu v M'Chabari Kinoro (2022) eKLR, where the courts emphasized the need to specifically plead and particularize fraud in the pleadings.

12. On the evidence by the respondents that they were forced to buy materials from elsewhere to fill up the container, the appellant submitted that the respondents never produced any documents showing that the appellants received any materials from Nairobi Tanneries Ltd to export on behalf of the respondents.

13. The appellants submitted that the respondents failed to call a crucial witness in the case, Seth Murila, who was with the 3rd respondent (now deceased) at the appellants` factory when the agreement was entered into. That failure to call the witness drew an inference that if called his evidence would have been adverse to the respondents.

14. It was also submitted that the witnesses availed by the Respondents during the trial were not credible and that the materials adduced as evidence by the Respondents contradicted the position adopted in their pleadings. They also railed the failure by the Respondents to avail a key witness Mr. John Ngonjo who allegedly collected the shipping documents on 15th September 2010. Based on that, the Appellants made reference to the case of Njeka Ochunyi v M.G. Shah, NBI HCCC NO. 288 OF 1990 (OS) which stressed the need for parties to approach the court using clean hands.

15. Counsel for Appellants submitted that the 2nd Appellant was wrongly "enjoined" in the suit as a defendant. It was the Appellants position that the 2nd Appellant was merely an officer of the 1st Appellant and he did not execute the contracts on his own behalf but was acting on behalf of the 1st Appellant which is a separate legal entity which can sue and be sued. On this end, the Appellants cited the locus classicus case of Salomon v Salomon and Co. Ltd (1897) AC 22 on corporate personality.

16. The Appellants faulted the trial Magistrate for her failure to take in totality all the materials placed before her for the determination of the suit. It is thus their position that the decision is wrong as the analysis by the trial Magistrate is not supported by any evidence.

17. The Appellants submitted that going by the evidence on record, it was erroneous for the trial Magistrate to dismiss their counter-claim yet they had proved that the Respondents owed them a sum of USD 23, 633. It was submitted that the trial court only dealt with the issue of how USD 22,500 was utilized and failed to consider other issues such as the authenticity of the second contract, whether the plaintiffs actually delivered the material from Nairobi Tanneries to the 1st appellants` factory and whether it is actually the respondents who changed the terms of the contract.

Respondents` Submissions

18. The respondents submitted that they had proved their case on a balance of probabilities and had thus discharged their burden of proof. They in this respect referred to the case of William Kabogo Gitau v George Thuo & 2 others (2010) 1 KLR 526 on standard of proof.

19. The Respondents submitted that the issue of forgery of the second agreement or fraud was never pleaded right from the trial of the suit and does not feature in the submissions or in the judgment itself. Neither is it one of the issues raised in the memorandum of appeal. That the respondent merely stated that the 2nd agreement had an erroneous date of 11/6/2010. That the respondents did not plead or argue that there was fraud on the two agreements. The Respondents submitted that it would be erroneous for the Appellants to fault the judgment of the trial Magistrate for a decision she never made. On this, the Respondents placed reliance to the case of Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] eKLR where the court rejected an attempt to introduce a new ground of appeal not raised in evidence and the judge did not pronounce himself on the issue.

20. The respondents submitted that the issue of erroneous date does not affect the outcome of the case. That the issue was whether the appellants refunded the balance of USD 22,500. That the appellants did not show that they procured the 10 pallets of hides and received USD 6,500 from the plaintiffs as per the 2nd agreement. They did not have any evidence of purchasing the 10 pallets of hides nor evidence of supply of the same to the respondents. It was submitted that the appellants had failed to discharge their burden of proof.

21. The respondents submitted that the counterclaim has no basis as it is grounded on an invoice No.048 that formed part of shipment documentation of 20 pellets of wet blue goat skins that the respondents exported through the appellants. That the invoice was not brought to the attention of the respondents until when they started to demand the refund of USD 22,500.

22. It was submitted that the appellants did not refute in their pleadings that the 15 pellets were delivered to them. The respondent submitted that the argument was not raised during the trial.

23. The Respondents also submitted on the aspect of credibility of their witnesses urging this court to make a finding that credibility only applies to a witness and his witnesses. On the failure to call a key witness, the Appellants submitted that even if he was availed as a witness, his testimony could not be of any probative value since he only received the shipping documents on behalf of the Respondents which aspect does not touch on the facts-in-issue as the real issue revolved around the refund of USD 22,500.

24. On the aspect of wrongly "enjoining" the 2nd Appellant as a defendant during the trial, the Respondents submitted that the 2nd Appellant had carried himself in a way that his actions were also binding to the 1st Appellant and on this reason, there was a need to join him with the 1st Appellant as defendants during the trial. It was submitted that it is the 2nd appellant who received and acknowledged receipt of the money. He did not indicate that the payments were received on behalf of the 1st appellant. He was therefore liable for money that he received.

25. The respondents submitted that the contention by the appellants that the judgment of the trial court failed to take into considerations all the evidence placed before the court had no basis as the single issue for determination as framed by the trial Magistrate was on how the USD 22,500 was utilized. The Appellants were unable to explain how that sum had been utilized consequent to which the court entered judgment in favour of the Respondents.

Analysis and Determination

26. This being a first appeal, the duty of this court is as was laid out by the Court of Appeal in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, wherein the court stated that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

27. The court has also to bear in mind that the trial court had the advantage of seeing and hearing the witnesses testify and give due credit to that.

28. I have considered the record of the trial court, the pleadings and the submissions by the respective counsels for the parties. The issues for determination are:

    (1) Whether the Respondents discharged their burden of proving the claim of USD 22,500;

    (2) Whether the appellants had proved their counterclaim; and

    (3) Whether the 2nd Appellant ought to have been joined as a co-defendant in the suit.

29. It is trite that he who alleges must prove. That is the avowed position adopted by section 107 of the *Evidence Act*.

30. The standard of proof in ordinary civil matters is on a balance of probabilities. Justice Luka Kimaru (as he then was) in William Kabogo Giatu v George Thuo & 2 others (supra) held as follows on what it means by balance of probabilities:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

31. There is no dispute that the parties entered into two contracts. The appellant contends that both contracts were entered into on the 11/6/2010. The respondents agree that the first contract for the supply of wet blue goat skin pallets was entered into on 11/6/2010. They however contend that the second agreement for the supply of 10 pallets of wet blue hides was erroneously dated 11/6/2010 but was in actual fact entered into on the 31/8/2010.

32. I have examined the documents produced in the case. It is clear from the evidence that on the parties entering the first agreement to the tune of USD 90,000, the respondents made a deposit of USD 15,000 on 11/6/2010 as per acknowledgment by the 2nd appellant of the said date. The respondent made a second deposit of USD 30,000 on 21/6/2010 as per acknowledgment by the 2nd appellant of that date. That made a total deposit of USD 45,000 which is not in dispute.

33. At page 2 of the agreement of USD 90,000, there is an acknowledgment in writing by the 2nd appellant that reads as follows:

> Supplied 5 pallets
>
> Value $ 22,500
>
> Balance 22,500 transferred to Hides. Order ref.17/10

34. The question that lingers my mind is this: if both agreements were entered into on 11/6/2010 as contended by the appellants, why would the 2nd appellant have been acknowledging having supplied 5 pellets on that date when nothing had been supplied by that date? Why would he acknowledge a balance of USD 22,500 by that date when what was paid on that date was USD 15,000? More so why would he acknowledge the balance of US D 22,500 being transferred to Hides Order 17/10 by that date when the deposit paid was USD 15,000? Where would the money over and above the USD 15,000 have come from if what had been paid by that date was USD 15,000? It is clear to me that there can only have been a balance of USD 22,500 if the total paid was USD 45,000. The last payment that brought the deposit to UD 45,000 was made on 21/6/2020.

35. I have perused the sales contract No.17/10 agreement to supply 10 pallets of wet blue hides. The same indicated that there was an advance payment of UD 22,500. For the agreement to have mentioned the advance payment of USD 22,500 can only mean that the agreement was made after 21/6/2010. If the agreement was made on 11/6/2010, it cannot have mentioned an advance of USD 22,500 as the full deposit of USD 45,000 had not been made by that date. It is therefore logical to conclude that the second agreement on supply of hides was entered into after the deposit of USD 30,000 was made on 21/6/2010 to make the full deposit paid to USD 45,000. That would explain the agreement between the parties for the transfer of USD 22,500 to the hides order No. 17/10. I thereby find no truth by the 2nd appellant that both agreements were entered into on 11/6/2010.

36. Further to this, the contract sales order agreement No.17/10 for supply of 10 pallets of wet blue hides at the value of USD 29,000 indicates the time of shipment of the commodity as 6/9/2010. It further indicates the validity period of the contract as 10 days from the date of issue. I do not think that the agreement would have indicated the time of shipment as 6/9/2010 and validity period as 10 days if the agreement was made on 11/6/2010. The respondents contended that the actual date of the agreement was 31st August 2010. That, in my view, explains the date of shipment indicated in the agreement as 6/9/2010 when taken in the context of the validity of the agreement as 10 days. The likelihood is that the 2nd agreement was entered into on 31st August 2010 as contended by the respondents.

37. The trial court found that the respondents had proved their claim of USD 22,500 against the respondents. The appellants on the other hand maintained that they made the supply of USD 22,500.

38. The respondents explained that the reason why the second agreement was entered into is because the appellants were unable to supply the full 20 pallets of wet blue goat skins and only supplied 5 pallets worth UD 22,500, leaving a balance of 15 pallets. The respondents contend that the 3rd respondent then procured the 15 pallets from Nairobi Tanneries that he delivered to the appellants to add to the 5 pallets procured by the appellants to make a total of 20 pallets that the appellants shipped on their behalf.

39. The appellants deny that the respondents delivered to them the 15 pallets to add to the 5 pallets for them to export the 20 pallets for them. They contend that the 3rd respondent changed the contract and instead asked to be supplied with 5 pallets of wet blue goat skins and the balance of UD 22,500 from the deposit of USD 45,000 be utilized to supply the respondents with wet blue hides. That they supplied the 5 pallets of wet blue goatskins valued at USD 22,500 and 20 pallets of wet blue goat skins of different grades valued at USD 45,533, all to make a total of USD 68,033. That since the respondents had paid USD 45,000, they owed the appellants USD 23,033 which they counterclaimed. The appellants at the same time admitted the contract to supply 10 pallets of wet blue hides worth USD 29,000.

40. The question then is whether the appellants supplied the goods as contended.

41. The last paragraph of the sales contract agreement for the supply of USD 90,000 wet blue goat skin pallets provides as follows:

> ”Any alteration or attachment to this sales contract shall be valid only if the two parties have signed up in written form and be regarded as an integral part of this contract”.

42. This means that any party alleging that the other party changed the contract has to produce evidence in writing that the parties agreed to the changes.

43. The respondents contend that the appellants were unable to supply the contract of US 90,000 and could only supply 5 pallets worth USD 22,500. That the appellants refused to refund the balance of USD 22,500. That it is after they refused to refund the balance that they entered into the second contract for them to supply wet blue hide skins at a cost of USD 29,000 with the balance of USD 22,500 being converted to an advance payment for the contract.

44. As stated above, page 2 of the contract of USD 90,000, indicated that:

> “ Balance 22,500 transferred to Hides. Order ref.17/10.”

45. The 2nd appellant gave evidence in the case. He admitted in cross-examination that he did not supply 20 pallets of goat skins within 28 days of the agreement. He admitted that he only supplied 5 pallets worth USD 22,500. He admitted that he agreed to the balance of the deposit being transferred to the

purchase of 10 pallets of cow hides. He stated in cross-examination that he supplied 10 pallets of hides though he did not produce any documents to prove the said supply.

46. If the respondents changed the contract as contended by the appellants, there was nothing in writing produced to prove such alterations as was required under the two agreements. It is clear to me that the appellants were unable to meet the supply in the contract of USD 90,000 and the deposit of USD 22,500 was transferred to Order No.17/10 of USD 29,000 as indicated in the 2nd agreement for supply of wet blue hides. This second agreement indicated that there was a balance of USD 6,500 which was to be paid on delivery. Nowhere in the entire evidence did the appellants show that they supplied the wet blue hides at the contract sum of USD 29,000. Neither did they show they were paid the balance of USD 6,500 after delivery. There was no evidence that they made a demand of USD 6,500 on delivery of the hides. It is clear that the appellants were in breach of the agreement to supply wet blue hides worth USD 29,000. I agree with the trial court that they did not refund the deposit sum of USD 22,500 upon breach of the contract.

47. The appellants claimed in their counterclaim that they supplied the respondents with 5 pallets of wet blue goat skins valued at USD 22,500 and 20 pallets of wet blue goat skins valued at USD 45,533 making a total of USD 68,033. That the respondents only paid USD 45,000 leaving a balance of USD 23,533 which they counterclaimed. The appellants at the same time admit that part of the deposit for the contract of USD 90,000 was transferred to a fresh contract to supply wet blue hides as per order 17/10. What then was the fate of the contract of USD 90,000 for the supply of wet blue goat skins after part of its deposit was transferred to order No.17/10?

48. It is clear that by the time the second contract was entered into, the appellants had supplied 5 pallets of wet goat skins worth USD 22,500 and there remained a balance of USD 22,500 of the deposit of USD 45,000 made by the respondents. It was agreed that the balance be transferred to a second contract of supply of 10 hide skins worth USD.22,500. That being the case, how then did the appellants supply 20 pallets of goat skins worth USD 45,533 instead of supplying wet blue hides as per the second contract? The fact that the parties agreed to have the balance of the deposit for goat skins being transferred to another contract for supply of hides meant that the contract for supply of wet blue goat skins had been cancelled by mutual agreement of the parties. It is to be noted that the appellants never made any demand to the respondents for the supply of 20 pallets of goat skins until when the respondents made the claim of USD 22,500. I find this to be unusual. I do not believe that the appellants are the ones who made the supply of 20 pallets of goat skins. The more believable evidence is that after the appellants failed to supply the consignment of 20 pallets of wet blue goat skins and only supplied 5 pallets, the respondents procured the balance of 15 pallets which was added to the 5 supplied by the appellants to make 20 pallets which consignment was shipped by the appellants on behalf of the respondents. The appellants were paid for the 5 pallets that they supplied. They did not prove that they are the ones who procured the 15 pallets. I find no evidence in proof of the counterclaim of USD 23,033.

49. The 2nd Appellant argued that he was wrongly enjoined as a co-defendant in the suit. In law, a joinder of parties is permitted where any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, see Lucy Nungari Ngigi & Others v National Bank of Kenya Limited & Another [2015] eKLR. In the present case, evidence was adduced that the 2nd appellant had all through carried himself as an agent of the 1st Appellant. He was the person who was in contact with the 3rd Respondent and received money on behalf of the 1st Appellant. Invoking the principles of corporate personality was defeatist in the sense that the 1st Appellant had also been sued in its corporate name. I find that it was necessary to join the 2nd appellant in the suit since the respondents were following their right to relief in respect of or arising out of the same act or transaction or a series of acts or transactions. The argument of the 2nd appellant that he was wrongly sued is therefore dismissed.

50. From the foregoing, I find that the trial court came to the right decision in its finding that the respondents had proved their claim of USD 22,500 against the appellants. I find no evidence that the appellants had proved their counterclaim against the respondents. I accordingly find the appeal to be devoid of merit. The same is dismissed with costs to the respondents.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Kanyi Ngatia H/B Kinyua Muriithi for Appellants

K Bahati for Respondents

Court Assistant – Amina

30 days Right of appeal